

August 29, 2002

Dear Colleague:

I write to urge your active support for the homeland security legislation endorsed in July by the Senate Governmental Affairs Committee—legislation that would create a strong, coherent, and accountable Department of Homeland Security to protect America against the threat of terrorism.

It is no exaggeration to say that today, our federal government's domestic defenses are dispersed, disjointed, and dysfunctional. They are structured as relics of the Cold War, not designed to combat the asymmetrical and unconventional threat of contemporary terrorism, which has so suddenly and tragically reached our soil. We were unprepared on September 11<sup>th</sup>, and despite new investment and better coordination since then, despite the hard work of the Congress, the President, his Homeland Security Advisor, and State and local officials, significant vulnerabilities remain.

We will continue to be ill-equipped to defend against our terrorist enemies until we consolidate the dozens of disparate federal agencies and offices responsible for homeland defense into a single department with a unified chain of command.

That is the purpose of our legislation. Like the Administration's proposal and the House legislation passed last month, our legislation would create one Federal department with the power, personnel, and resources to work with states, cities, counties, other Federal agencies, Native-American tribes, and the private sector to do this immensely complicated job.

We have built upon the original legislation creating a Department of Homeland Security proposed last October by Senator Specter, myself, and a bipartisan group of House members—which drew its inspiration from the recommendations of the U.S. Commission on National Security/21<sup>st</sup> Century chaired by former Senators Hart and Rudman. That legislation has been refined based on the expert advice gleaned from 18 post-September 11<sup>th</sup> Governmental Affairs Committee hearings on the subject and numerous hearings by other committees; merged in May with legislation proposed by Senator Bob Graham and others; reported out of Committee in May; further developed through extensive discussions with colleagues, including committee chairs and ranking members; and—since President Bush embraced the idea of such a Department this June—honed through ongoing conversations with the White House.

The legislation that will be debated on the Senate floor in September was endorsed by the Governmental Affairs Committee on July 25 by a bipartisan vote of 12-5, incorporating many suggestions offered by fellow committee members and by numerous Senate committees.

### **A Common Vision**

The end product of this careful Senate process is very similar to the Administration's proposal as it was unveiled in June, and to the legislation passed by the House last month. The overall mission and powers of the new agency in our proposal and the Administration's are virtually the same. The federal agencies and offices we seek to consolidate into the new Department are virtually the same. The divisions we would create focused on emergency preparedness and response, border and transportation security, and critical infrastructure protection are very similar. Both our approaches would have FEMA and the Coast Guard play central roles. And both proposed models would develop important new science and technology capabilities within the new Department.

Both the Committee-endorsed bill and the Administration would, for the first time in American history, create one department to secure our borders, ports, airports, railways, roads, and critical infrastructure; one department to coordinate communications with State and local governments, private industry, and directly with the American people; one department to help equip and train first responders; one department to spark the development of a new wave of science and technology to protect us from attack.

We know that reorganizing our homeland security efforts is not, in and of itself, the answer to the challenges we face. But we know that the current disorganization will guarantee failure. Only by starting with an intelligent organizational design, a unified chain of command, and an accountable leader capable of getting results can our personnel and resources be effectively coordinated, with an overarching vision and as few gaps or overlaps as possible.

The Committee-approved Homeland Security bill makes major progress in meeting the following goals:

**Requires a Homeland Security Strategy for the Nation**

- to be implemented across *all* parts of government

**Requires a Comprehensive Assessment of Threats and Vulnerabilities**

- we need to understand much better the worst threats and the best ways to respond; the legislation mandates that focus

**Requires Close and Ongoing White House Coordination**

- many agencies involved in the fight against terrorism, including intelligence, diplomatic, and law enforcement agencies, will remain outside the new Department; the legislation strengthens the existing White House Office to better assure coordination

**Bolsters Emergency Preparedness and Response**

- all layers and levels of government need to be working together to anticipate and prepare for the worst; the new department will develop and implement a comprehensive response plan in conjunction with local authorities

**Builds Strong Bonds between Federal, State and Local Government**

- State and local officials are the front lines of the fight against terrorism; the new department will reach out to those public servants with better training, new tools, and a coordinated prevention and protection strategy

**Includes Consensus Provisions to Reform Government**

- contains bipartisan civil service reform that provides significant new management flexibility in hiring employees and shaping the workforce

**Brings Key Border and National Entry Agencies Together**

- creates the means to ensure their effective coordination for the first time, keeping dangerous people and goods out without restricting the flow of legal immigration and commerce

**Facilitates More Effective Homeland Security Intelligence Coordination**

- creates the first focal point for swiftly receiving and analyzing all threats against the U.S. homeland

**Promotes Dramatic New Research and Technology Development Opportunities**

- the development and deployment of advanced technologies will be crucial to our homeland security; the legislation leverages government research capabilities and focuses academic, non-profit, and other private sector innovation on the challenge

**Points of Disagreement**

Despite our substantial agreement on the overwhelming need for a new Department of Homeland Security, there are a few significant differences among all three homeland security proposals before the American people today (House, Senate Governmental Affairs Committee, and White House).

These differences can be divided into five substantive areas: management flexibility (both union and civil service), reorganization authority, appropriations flexibility and transition funding, intelligence analysis, and the statutory creation of a White House Office for Combating Terrorism.

Regarding the first three issues, we have given the Administration all the power it needs to create and run an effective, performance-driven department—but have been careful not to weigh down this urgent piece of legislation with distracting, divisive provisions that are frankly peripheral to the core mission at hand, which is to consolidate the right agencies into a unified and accountable mission-oriented cabinet-level department. In my view, the Administration has blurred the focus of its bill, and risked dragging this common cause into a quagmire of unnecessary controversy by tacking on significant but vague new executive powers that are uncalled for and in some cases unprecedented. And when it comes to our differences on intelligence and the creation of a National Office for Combating Terrorism, I strongly believe our legislation presents a more thorough solution to the problems currently preventing our domestic defenses against terrorism from being as effective as they can possibly be.

As we take time to work through these disagreements, we must keep them in perspective. It would be a tragedy for us to scorch the substantial tract of common ground on which all our proposals have been built, and in the process fail to create the strong and accountable Department of Homeland Security the American people deserve.

#### 1. Management Flexibility

The Department our legislation envisions will be a modern, performance-driven federal agency—one that the Secretary and the President will have extensive authority to manage. The Committee-endorsed bill contains flexible provisions on personnel management, including an important bipartisan civil service reform package. Taken together, these provisions strengthen the Secretary's and President's hands in managing the new Department without jeopardizing key worker protections.

The Administration has taken issue with our approach, claiming that our legislation will restrict its ability to manage the new Department efficiently and effectively. That is just wrong. Moreover, I am disappointed by the Administration's inordinate focus on this bright red herring, which threatens to distract us from our shared goal of creating a unified and accountable Department of Homeland Security.

*Civil Service.* Nothing in our proposed bill lessens the powers under current law that the President and Secretary have to reward excellence, remove poorly performing employees, offer recruitment bonuses, and use many other performance-oriented management tools. To the contrary, in an effort to give the Department and other agencies additional flexibility in the management of personnel, our legislation adopts significant, government-wide civil service reforms, contained in provisions proposed by Senators Voinovich and Akaka. To support research and development, we also authorize the Secretary to use innovative techniques in hiring talent and funding projects. Taken together, this package will give the Secretary the ability to: speed up staffing of new employees; recruit and retain top science and technology talent; procure temporary services outside the civil service system when there is a critical need; reshape the workforce; reform old competitive-hiring practices; provide more effective bonuses for exemplary performance; promote procurement flexibility in research, development, the prototyping of new technologies, and other procurement; and make additional valuable changes to help the new Department attract, maintain, and motivate the best talent. These reforms represent a major modernization of the way federal agencies are managed.

I have heard some opponents of our approach contend that under our legislation, an incompetent, irresponsible, or even intoxicated employee could not be removed from duty. That's nonsense. Under current law, such an employee can be removed from duty immediately, without hesitation or red tape. And the employee can be taken immediately off the payroll if the Secretary determines that he or she might endanger national security.

What we have not done in our bill is accept what I consider to be a divisive distraction and detour contained in the President's proposal: providing the Administration the unprecedented and unchecked power to waive any and all civil service protections, essentially rewriting the law wherever and whenever it sees fit. The Committee-endorsed bill undertakes the hard task of defining the details of major civil service reforms in a bipartisan manner,

building on advice from a wide range of experts; the Administration bill by contrast avoids these details and simply gives itself the authority to wipe out the application of the civil service system to the new Department.

The President claims that he deserves “flexibility”—and that our legislation denies him flexibility by “handcuffing” him and the Secretary from exercising their rightful authority. But the President’s pleas for flexibility are in fact a request for broad and unchecked authority. Congress has a duty to the American people to make laws. If we left it up to the Administration to rewrite the civil service law, we would be abdicating that responsibility.

Let us remember that a key purpose of the civil service system is to provide a check on the politicization to which government agencies are susceptible in any administration. The civil service laws not only assert, in principle, that personnel decisions should be based on considerations of merit, not politics or cronyism or prejudice, but also provide procedures and remedies so that these principles are not honored in the breach. Think for a moment what it could mean to lose the public accountability assured by the civil service system. Talented senior managers who have dedicated their careers to public service could be fired without cause and replaced with patronage appointees; potential whistleblowers at all levels of the organization would know they have little or no real protection against retaliation; employees’ union representatives could be stripped of much of their ability to protect the rank and file against abusive or self-protective political appointees; veterans and minorities could see their statutory rights ignored, or worse, with insufficient remedy.

A recent article in *The New Republic* discussed the dangers of a politicized Department that could result under the kind of “flexibility” the Administration seeks:

“The Customs Service, for instance, could impede--through selective inspection--the imports of certain companies that contribute to one or the other political party. The Federal Emergency Management Agency could steer its public assistance grants to local governments and nonprofits the administration deems politically sympathetic and away from those it does not. Finally, there’s the National Infrastructure Protection Center (NIPC). Currently housed in the FBI but slated to be shifted to the DoHS, NIPC is responsible for assessing and informing the government and the private sector about the threat terrorism poses to certain institutions (like banks, communications networks, and transportation systems). As part of this task, the NIPC routinely requests potentially sensitive information from private-sector firms such as those in the financial-services industry, which has a NIPC partnership for information exchange. Such information could easily be used for nefarious political purposes. And even if it weren’t, the mere fact that the information was being requested and handled largely by political appointees might cause some firms--already averse to coughing up information--to stop cooperating with NIPC’s exchange partnership altogether.”

These abuses may not occur, but with the authority to waive all civil service protections, the temptation would be strong. That is why the Committee elected to undertake a harder job of coming up with the details for the key reforms for this new entity to work well, rather than just giving the Administration authority to eliminate the entire system, including its strengths, wholesale. Management experts agree that the success of a complex merger comparable to the creation of this new Department depends upon keeping the workforce motivated and upon reinforcing—not undermining—its sense of stability. The Administration’s proposal for unprecedented, unspecified powers will do just the opposite.

We recognize that, as the Secretary begins building the new Department, the Congress may need to consider changes to the law to give him or her even more authority. That is why our legislation requires the Secretary to return to Congress in six-month intervals during the reorganization process and propose changes, including changes to the civil service system that may make his or her job easier. There will be time to make necessary reforms if need be; today, it is unwise to attach such an inappropriate rider to this legislation.

*Collective bargaining.* On the issue of union rights, our legislation takes a similar approach—one that needs to be put in some historical context. During the Cold War, Presidents acquired the authority to take away, by executive order, the collective bargaining rights of particular agencies or subdivisions if and when the President concluded that union rights and national security were at odds. Now, among the approximately 170,000 employees

that will make up the new Department—almost all of whom will be transferred from existing federal agencies and offices and will continue doing those jobs—there are some 43,000 employees (e.g., in the Customs Service, the INS, the Coast Guard, and FEMA) who are represented by unions. No President has seen fit to remove the collective bargaining rights of these employees. The question before us is: should these employees risk losing their collective bargaining rights only because they are being transferred to this new Department? That is their fear. Remember that the union rights of these workers are very limited in the first place because federal employees are forbidden to strike.

The Committee bill allows the President and Secretary to remove collective bargaining rights when appropriate. But the Committee bill also provides these employees—on whom the success of the new Department will rise or fall—a reasonable reassurance that their existing basic protections will not be unfairly and unreasonably undermined only because they go to work for the Department of Homeland Security.

The Committee's legislation says the following: when these employees move into the new Department, they will keep their existing collective bargaining rights—unless their job changes, and there is a national security rationale for taking those rights away. In that event, the Secretary can have collective bargaining rights removed from employees on a case-by-case basis, as long as he can show that these rights are a risk to national security.

In opposing this approach, the Administration is implying that union membership is somehow incompatible with an employee's effective, efficient, and loyal service to his or her country protecting our security. The New York City firefighters and police officers who lost their lives on September 11<sup>th</sup> were members of unions. Did that make them any less dedicated? Any less willing to answer their country's call, and risk or sacrifice their lives? I have not yet heard a single satisfactory argument supporting the contention that the union rights of these employees who may work as Customs inspectors or Border Patrol inspectors are incompatible with their ability to serve their country as best as they possibly can.

## 2. Reorganization Authority

All three proposals currently under consideration will make us safer by bringing various agencies responsible for homeland security into a single organizational framework and under a single chain of command. The importance of having dozens of disparate agencies and programs under one leader with focused policy priorities is not to be underestimated; this will be a great leap forward for America's domestic defenses.

Nevertheless, once these agencies and programs are consolidated, further reorganization of offices and functions at the Departmental level may well be needed to integrate incoming offices and to gain additional coordination, efficiency, and effectiveness.

The Committee-endorsed legislation allows for such intra-departmental reorganization by authorizing the Secretary to reorganize unilaterally to the extent consistent with applicable law. Where a change in law is required, the legislation tells the Secretary to recommend legislation to Congress enabling further reorganization, and requires such legislation to be submitted for consideration at six-month intervals or earlier.

Under the President's proposal, the Secretary would have unchecked and undue reorganization powers—including the ability to dissolve or reshape agencies or offices created in law with major ongoing missions without Congressional approval. This, in essence, is *carte blanche* for the executive to ignore and rewrite, by fiat, the statutes that created the constituent agencies and offices in the first place. The only limits the President's proposal places on reorganization power would be that the Secretary could not abolish the Secret Service or the Coast Guard; in any and all other cases, the Secretary would simply have to give Congress 90 days notice before in effect eliminating existing statutes. Mere notice is not sufficient; Congress must exercise active oversight and decision-making authority. It's also important to note that the Committee-endorsed bill actually specifies a massive reorganization of the one agency that everyone agrees is most in need of reform, the INS.

In June, Senators Byrd and Stevens wrote to me urging that the Committee reject the Administration's reorganization proposal. They wrote, "Congress should not authorize the Executive Branch to establish, consolidate,

alter, or discontinue agencies of government that are established in statute. This is Congress' responsibility." Our legislation maintains this constitutional separation of powers.

### 3. Appropriations Flexibility and Transition Funding

As my colleagues know, the power of the purse—appropriating taxpayers' money on their behalf—is a core Constitutionally-assigned responsibility of Congress. Article I, Section 9 states unambiguously: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."

The Administration's proposal seeks to except the new Department from these traditional arrangements regarding the use of appropriated funds, and in doing so, sets a bad precedent. The Administration seeks the authority to take up to 5 percent of funds appropriated to each agency slated for transfer to the Department and use these funds for any purpose under the legislation. This would allow the Administration authority to cancel some \$2 billion in ongoing programs at existing agencies at its discretion and to spend that funding on anything it chooses anywhere in this new Department.

Allowing a percentage of the Department of Homeland Security's budget to escape Congressional oversight raises major Constitutional problems and is an unacceptable end run around the appropriations process that is one of Congress's most critical responsibilities. Our legislation preserves the customary role of Congress in ensuring that such funds are used effectively, efficiently, and according to the will of the people. In their June letter, Senators Byrd and Stevens urged that the Committee not include the Administration's proposed transfer authority in our bill. They wrote: "The proposal by the President provides the new Secretary with extraordinary powers, powers that could potentially tip the delicate balance of Constitutional powers between the Legislative and Executive branches of government. These are powers that the Secretary of Defense and the Secretary of State do not currently have, nor should they have. The Framers carefully crafted that balance, and it has served the nation well for more than 200 years." I agree.

The Administration has argued that such flexibility is needed, in part, to provide necessary start-up funding for the new Department. Our legislation, however, provides a mechanism for the Secretary to obtain that funding through the appropriate appropriations process. We require the Administration promptly to submit a transition budget, so that this Congress can exercise its responsibility to appropriate the necessary funds in this legislative session.

The Administration has sought to justify its request for power to transfer appropriations by stating, in the analysis accompanying the Administration's proposed legislation, "Appropriations transfer provisions are enacted annually in a number of appropriations acts." That is true; annual appropriations bills sometimes build in such flexibility, but typically in smaller amounts and with closer Congressional scrutiny. In any event, this is an argument against, not for, the broad additional flexibility the Administration seeks in its proposal. The right way for the Administration to seek this authority is to request it as part of its annual appropriations, not as a permanent "slush fund" authority in the enabling legislation.

### 4. Intelligence

It is self-evident that our government cannot adequately protect our country from terrorism if it fails to detect terrorist attacks before they occur. That is why we owe it to the American people to examine the substantially different approach between the Committee endorsed legislation and the Administration's proposal.

The Committee-endorsed legislation creates an independent Directorate for Intelligence to fuse in a single place and analyze law enforcement and other information from all relevant sources—including foreign intelligence analysis from the Director of Central Intelligence's Counterterrorism Center, other agencies of the United States Government, State and local agencies, and private sector entities. The new Department will not just receive intelligence collected from other agencies; it will collect a significant amount of new information in-house—from Customs, INS, the Coast Guard, and other agencies that will be part of the new Department. In the post-September 11<sup>th</sup> world, this information is now crucial, which will make the new Department a key information resource. All of

this will be centrally managed, then integrated with what's gathered from the FBI, CIA, and other outside sources. Simply put, the Directorate's mission will be to do everything possible to "connect the dots" to prevent attacks before they occur; enhance border security; protect our critical infrastructure; and better inform our emergency preparedness and response as well as our research and development activities.

These provisions were developed through extensive discussions with Intelligence Committee Chairman Graham, Vice Chairman Shelby, former Intelligence Chairman Specter, and Armed Services Chairman Levin, as well as Senators Akaka and Durbin.

In our legislation, the Secretary is provided routine access to reports, assessments, analytical information, and other information—including unevaluated intelligence—relating to the capabilities, intentions, and activities of terrorists and terrorist organizations, unless otherwise directed by the President. The Secretary will work with the Director of Central Intelligence to protect sources and methods, and with the Attorney General to protect sensitive law enforcement information. The legislation also reaffirms the role of the Director of Central Intelligence's Counterterrorism Center, which will continue to have primary responsibility for the analysis of foreign intelligence relating to international terrorism and providing that analysis to the Directorate for Intelligence, which can also conduct its own supplemental analysis of foreign intelligence.

This model differs from the Administration's proposal in several critical respects. The Administration's proposal would embed the homeland security intelligence functions within the division of the new Department also responsible for critical infrastructure, whereas the Committee-endorsed legislation establishes separate directorates and undersecretaries, for intelligence analysis and for critical infrastructure protection. The reason behind our approach is simple: intelligence analysis will be crucial to everything this department does, and to State and local authorities—not just to federal infrastructure protection efforts. We can imagine many threats to American lives that don't involve critical infrastructure protection at all: a plot to detonate a bomb in a shopping mall, for instance, or to unleash a biological agent on a city from above.

By tying the intelligence functions to critical infrastructure, the Administration's approach places insufficient emphasis on the importance of this analysis in preventing attacks, enhancing border security, and assisting in other phases of the homeland security fight. It also misses the opportunity to establish an independent directorate to provide analysis to policy-makers, to law enforcement, and to other agencies. Moreover, the Administration's proposal does not account for the fact that intelligence analysis and critical infrastructure protection are both very demanding jobs—each of which, in sheer complexity, requires the attention of a separate undersecretary.

The Administration's proposal also unnecessarily restricts the Secretary's access to unevaluated intelligence. As long as sources and methods are protected—and the Committee-endorsed legislation ensures that they will be—there is no reason to restrict the Secretary in statute from also receiving the unanalyzed information that comprises reports, analysis, and assessments, if and when the Secretary needs it. The Secretary should be able to determine what information he or she requires in order to protect the American people and receive it routinely from the intelligence community and other agencies, unless otherwise directed by the President. The Secretary can also establish cooperative agreements with agencies as necessary to manage information flows. And, he or she must have the authority—as the President provides—to receive additional information from agencies. Given the historic difficulties within the Intelligence Community with sharing information, I believe that creating statutory barriers to the Department's access to information is unwise and counterproductive.

## 5. The National Office for Combating Terrorism

A final area of disagreement between the Committee's and the Administration's proposal is contained in Titles II and III of our legislation, which would build on the current Office for Homeland Security by creating within the White House a statutory National Office for Combating Terrorism. The Senate-confirmed Director of this office would work with the Secretary of Homeland Security to develop the government's overarching anti-terrorism strategy.

Our legislation calls for the creation of such an office on the strong recommendation of Senator Bob Graham and others. The war against terrorism goes beyond the new Department of Homeland Security. It involves diplomatic, intelligence, treasury, law enforcement, public health, transportation, and military agencies—including many functions that cannot be folded into the new Department, no matter how we structure it.

We believe that without creating such an office, the government's anti-terrorism strategy will inevitably be incomplete and uncoordinated. As Former Assistant Secretary of Defense Ashton Carter, testifying before the Governmental Affairs Committee, said, "The announcement of an intention to create a cabinet-level Department of Homeland Security should in no way obscure the paramount need for a strong White House hand over *all* aspects of homeland security....The nation's capabilities for homeland security, even optimally coordinated, are simply not adequate to cope with 21<sup>st</sup> century terrorism. What is needed is far less a coordinator of what exists than an architect of the capabilities we need to build."

The Director position our legislation creates will be responsible for developing national objectives and policies for combating terrorism, and working with the Secretary of Homeland Security and other agencies to develop a comprehensive national assessment of terrorist threats and vulnerabilities. He or she will also coordinate and assemble, with the advice of the Secretary, a comprehensive anti-terrorism budget. The challenging bureaucratic tasks to be performed by the Director underline the need to create the position in statute, and the importance of the job underlines the need to hold him or her accountable to the Congress and the American people.

### **Conclusion**

Building a Department of Homeland Security to help protect America from terrorism is one of the biggest challenges our government will face in the 21<sup>st</sup> century. As we resolve the differences I have mentioned and others, I know we will prove to the American people that we are capable of rising to this challenge together. We must not allow our urgent common mission to be derailed by a few disagreements. Our nation needs a strong and accountable new Department that will protect its people from the threat of terrorism today, tomorrow, and into the future.

Sincerely,

Joseph I. Lieberman